

STATE OF CALIFORNIA  
DECISION OF THE  
PUBLIC EMPLOYMENT RELATIONS BOARD



MODESTO CITY SCHOOLS,	)	
	)	
Employer,	)	Case No. S-R-750
	)	
and	)	PERB Decision No. 567
	)	
MODESTO TEACHERS ASSOCIATION,	)	April 17, 1986
	)	
Employee Organization,	)	
	)	

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Appearances: Breon, Galgani, Godino & O'Donnell by Sharon M. Keyworth for Modesto City Schools; Ken Burt, Attorney for Modesto Teachers Association.

Before Hesse, Chairperson; Morgenstern and Burt, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Modesto City Schools (hereinafter District) to a proposed decision of the Chief of the Division of Representation. In the proposed decision, it was found that a unit of all substitute teachers in the District is an appropriate bargaining unit.

For the reasons discussed below, we reject the proposed decision and remand the petition for representation to the Chief of the Division of Representation, for further action consistent with the following discussion.

PROCEDURAL HISTORY

The Modesto Teachers Association (Association) filed two conflicting representational petitions on two consecutive

days. On November 3, 1983, the Association requested recognition as the exclusive representative for a unit of substitute teachers who work one day or more per year in the District. On the next day, the Association filed a unit modification petition to add substitute teachers who work two days or more per year to the regular certificated unit, which was represented by the Association.

Initially, the District opposed the unit modification petition. On November 30, 1983, the District filed its Response to Petition for unit Modification. In it, the District argued that no community of interest existed between these groups, that the efficient operation of the District would be impaired, and that a majority of the substitute teachers did not support the unit modification.

On February 6, 1984, the District requested that PERB conduct an investigation to determine the appropriateness of the proposed modifications to the existing certificated unit. On March 9, 1984, the Association withdrew its unit modification petition. On April 3, the parties met with a Board agent to discuss an election for the proposed unit of substitute teachers. At this meeting, the District changed its position and opposed a separate unit of substitutes. It believed that a community of interest did exist between substitute teachers and the regular classroom teachers. Thus, it argued, substitutes should be included in the established certificated unit.

A formal hearing was held by Board Agent Joe Basso on September 26, 1984. After Basso resigned from PERB, the case was reassigned to Janet Caraway, Chief of the Division of Representation. Caraway issued a proposed decision on May 8, 1985.

#### FACTS

The District employed approximately 173 substitute teachers as of April 3, 1984. Of the 173 substitute teachers, 63 were placed on a preferred list. Placement on the list meant that they were guaranteed at least one day's work by October 31, 1984.

In the District, day-to-day substitute teachers generally perform the same basic functions of the teachers whom they replace in the classroom. In addition to teaching, they assign and correct homework; prepare, administer and grade tests; enter grades in the grade book; maintain control in the classroom; and plan and coordinate the work of an instructional aide when necessary. Also, substitute teachers may be required to prepare bulletin boards and take bus and yard duty assignments if these duties have been assigned to the teacher for whom they are substituting. All substitute teachers and regular teachers must have a B.A. degree and hold a valid California teaching credential.<sup>1</sup>

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<sup>1</sup>Substitute teachers who have 90 units of university work may obtain an emergency substitute teaching credential which is valid for 30 days.

In addition to the above basic work of the day-to-day substitute teachers, long-term substitutes may supervise students on field trips, conduct parent-teacher conferences, enter grades on report cards and enter grades on student cumulative folders.

Although substitute teachers may share the same interests and concerns of all certificated employees, there are differences between substitute teachers and regular classroom teachers. Substitute teachers do not accumulate sick leave or other types of leave, nor do they receive health benefits. Day-to-day substitute teachers are not required to attend faculty meetings or perform extra duty stipend activities; i.e., coaching after-school sports, chaperoning after-school dances, etc. They have no guarantee of employment and do not enter into written employment contracts with the District. Substitute teachers cannot acquire permanent status in the same manner as regular classroom teachers. While regular classroom teachers qualify for membership in the California state Teachers' Retirement System as soon as they begin teaching in the District, substitute teachers must teach 100 or more days per year to become eligible.

#### DISCUSSION

In the proposed decision, the Board agent reviewed the unit appropriateness criteria found in the Educational Employment Relations Act (EERA) section 3545(a);<sup>2</sup> i.e., community of

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<sup>2</sup>EERA is codified at Government Code section 3540 et

interest, efficiency of operation, history of representation and extent of organization. she found that, in the instant case, the substitute teachers shared a community of interest among themselves.<sup>3</sup> Thus, the Board agent concluded that a separate unit of substitutes is an appropriate unit and granted the representation petition.

The District's exceptions fall into two main areas: (1) that the proposed decision contains an inaccurate and incomplete statement of facts; and (2) that the proposed decision erroneously interprets and applies the mandate of EERA

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seq. unless otherwise indicated, all statutory references herein are to the Government Code.

EERA section 3545 provides, in relevant part:

(a) In each case where the appropriateness of the unit is an issue, the board shall decide the question on the basis of the community of interest between and among the employees and their established practices including, among other things, the extent to which such employees belong to the same employee organization, and the effect of the size of the unit on the efficient operation of the school district.

(b) In all cases:

(1) A negotiating unit that includes classroom teachers shall not be appropriate unless it at least includes all of the classroom teachers employed by the public school employer, except management employees, supervisory employees, and confidential employees.

<sup>3</sup>Because there was no unit modification petition before the PERB, the Board agent did not make any findings regarding what community of interest substitutes and regular teachers may have.

section 3545(a) and (b)(1), as well as applicable PERB precedent.

The District states that certain facts were stipulated to or presented to the hearing officer which were not reflected in the proposed decision. These pertain to the number of substitutes in the District, and certain duties they perform. The District also finds it relevant that there are three categories of substitutes, that regular classroom teachers sometimes serve as substitute teachers, and that the regular classroom teachers and substitutes evaluate each other. Additionally, the Association has a history of representing substitutes and of adding other groups to the unit (e.g., psychologists and preformal teachers).

The facts that the District argues were left out of the proposed decision are not essential to the case. While they were part of the evidence presented, and thus part of the record, they are not pivotal. It is not germane to the issues presented in this case that there are three categories of substitute teachers and that other employees were added to the certificated unit. We find no prejudicial error in those omissions. Further, nothing indicates that these facts were not considered by the Board agent.

The District also argues that EERA section 3545 establishes a rebuttable presumption that all classroom teachers should be placed in a single bargaining unit, unless such a unit is shown to be inappropriate, and that PERB has recognized this

presumption in Los Gatos Joint Union High School District (1983) PERB Decision No. 355 and Peralta Community College District (1978) PERB Decision No. 77. Under this presumption, the burden of proving the appropriateness of a separate unit of substitute teachers rests squarely on those who oppose a comprehensive teachers' unit; i.e., the Association. Instead, the proposed decision shifts the burden to the District and requires it to prove the inappropriateness of a separate unit of substitute teachers. The District asserts that although the Peralta decision was not to have retrospective application, it was to apply to all subsequent representation cases. Since the representation petition in the instant case was filed four years after Peralta was decided, it is prospective and the Peralta presumption must be applied to this case.

The District also argues that there is nothing in the record in the instant case, save the existence of a contract between the District and the Association, which would indicate that inclusion of substitutes in the certificated bargaining unit would cause disruption and/or instability. Indeed, the Association offered no evidence, nor was any finding made in the proposed decision, that inclusion of substitutes within the regular certificated unit would cause disruption or instability in the existing unit. The District asserts that there is no evidence showing a lack of community of interest, but that, instead, the evidence of community of interest between the groups "is overwhelming."

The primary issue before us is what effect the Peralta presumption has on the instant case. In Peralta, the Board found that EERA section 3545 establishes a rebuttable presumption that all classroom teachers should be placed in a single unit, absent a showing of a lack of community of interest between the groups.

But because its decision would be disruptive to existing units if it had retroactive effect, the Peralta Board held that its decision would be applied prospectively only. Relying on that rationale, the Board agent found it inappropriate to apply the Peralta presumption to the instant case.

#### Prospective Application of Peralta

In Palo Alto Unified School District/Jefferson union High School District (1979) PERB Decision No. 84, the Board determined that it would not apply the test formulated in Peralta where retroactive application of the test would cause disruption and instability in the existing certificated unit. Not only was there a pre-existing unit which excluded substitute teachers, that case was already on the Board's docket. Indeed, Palo Alto/Jefferson, supra, was issued just two months after Peralta. There, the Board reasonably believed that application of Peralta to a case already in the "pipeline" would disrupt the existing relationships.

The instant case arose long after Peralta was issued and affects a group of classroom teachers - substitutes. While the representation petition, on its face, applies only to

substitute employees, it necessarily affects the existing certificated unit. Although substitutes were not originally included in the certificated bargaining unit, they now seek representation. Their placement now becomes relevant and the Peralta presumption does apply.

#### Effect of the Peralta Presumption

Early PERB cases either ignored the status of substitute employees,<sup>4</sup> or found they lacked a community of interest with regular classroom teachers.<sup>5</sup> Even after Peralta, substitute employees were excluded from certificated bargaining units.<sup>6</sup>

In 1981, the Board's treatment of substitute teachers changed. In Dixie Elementary School District (1981) PERB Decision No. 171, the Board found that a certificated unit

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<sup>4</sup>Tamalpais Union High School District (1976) EERB Decision No. 1; Lompoc Unified School District (1977) EERB Decision No. 13; Shasta-Tehama-Trinity Joint Community college District (1977) EERB Decision No. 31; Carlsbad Unified School District (1977) EERB Decision No. 41; Monterey Peninsula Community College District (1978) PERB Decision No. 76. (Prior to January 1, 1978, PERB was known as the Educational Employment Relations Board or EERB.)

<sup>5</sup>Belmont Elementary School District (1976) EERB Decision No. 7; Petaluma Elementary and High School District (1977) EERB Decision No. 9; Oakland Unified School District (1977) EERB Decision No. 15; Los Rio Community College District (1977) EERB Decision No. 18.

<sup>6</sup>Palo Alto Unified School District/Jefferson Union High School District (1979) PERB Decision No. 84; Paso Robles Union School District, et al (1979) PERB Decision No. 85; Berkeley Unified School District (1979) PERB Decision No. 101; Jefferson School District (1980) PERB Decision No. 133; El Monte union High School District (1980) PERB Decision No. 142.

which included substitute employees was appropriate. In that case, the Board found that it was not relevant that individual substitutes may not have expectancy of continued employment because substitutes, as a class, do expect future employment. That decision was affirmed by the Board in Dixie Elementary School District (1983) PERB Decision No. 298, where an unfair practice charge had been filed because the district refused to bargain with the certificated unit after substitutes and temporary employees had been placed in that unit pursuant to PERB Decision No. 171. The Board found that the district failed to offer either new facts or arguments of law supporting its contention that substitutes were not properly placed in the unit of full-time classroom teachers.

In Oakland Unified School District (1983) PERB Decision No. 320, the Board affirmed the hearing officer's decision granting a petition to add all regular certificated substitute employees to the certificated unit. The hearing officer found sufficient community of interest between these two groups of employees.

The Board has previously discussed whether a community of interest exists between substitutes and regular classroom teachers, and what effect a combined unit, or separate units, would have on the efficient operation of the District. Factors that have been considered include: qualifications, training and skills, job functions, method of determining wages or pay schedule, hours of work, fringe benefits, supervision,

frequency of contact with other employees, integration with work functions of other employees, interchange with other employees, and acquisition of seniority;<sup>7</sup> whether employees enjoy the same re-employment rights, required to attend same faculty meetings, prepare assignments and lesson plans, and perform other similar duties;<sup>8</sup> and whether they shared common purposes and goals.<sup>9</sup>

These criteria were reviewed in later cases as well. In applying these criteria to differing factual situations, the Board has reached various and often conflicting decisions. Each case must be considered on its own facts.

In the instant case, the issue before the hearing officer was whether a separate bargaining unit of substitute employees is appropriate. Because this issue was so limited, evidence was not presented regarding whether a community of interest existed between regular classroom teachers and substitute teachers. The only community of interest evidence presented and argued at the hearing was whether substitute employees shared a community of interest among themselves.

The District argues, however, that there is sufficient evidence to show that inclusion of substitute teachers into the

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<sup>7</sup>Los Angeles Unified School District (1976) EERB Decision No. 5.

<sup>8</sup>Belmont Elementary School District (1976) EERB Decision No. 7.

<sup>9</sup>Grossmont union High School District (1977) EERB Decision No. 11.

existing certificated unit would be less disruptive than a separate unit of substitute teachers. It bases this argument mainly on the role the Association has played in representing substitutes in adjusting grievances and in claims before the California Unemployment Insurance Appeals Board.

The District then asserts that the evidence shows that placing substitutes in a separate unit would impair the effective operation of the District. It states that there are a number of areas which could pose potential conflict between substitutes and regular teachers should they be in separate bargaining units. Because of this, there is a great potential for "whipsawing" the District. It argues that these "potential areas of conflict can best be resolved in a combined unit."

The Board agent incorrectly determined that the Peralta presumption did not apply to the instant case. Because of this error, the proposed decision fails to recognize that, in order to make a determination that a separate unit of substitutes is an appropriate unit, there must be a showing and a finding of lack of community of interest between substitutes and regular teachers sufficient to overcome the presumption against a separate unit of substitutes. The proposed decision highlights certain factors which distinguish substitutes from regular classroom teachers, but fails to discuss whether these factors affect their community of interest. Instead, the proposed decision holds that evidence of a community of interest between these groups has no relevance to a representation petition.

For the reasons stated above, we disagree. Nevertheless, there is inadequate evidence on the record to determine whether a community of interest does or does not exist between these groups. Therefore, we remand this case to the Chief of the Division of Representation to reopen the record and allow the parties to present evidence on the EERA section 3545(a) criteria; i.e., whether a community of interest exists between these groups, how the prior negotiating history in the District should bear on the issue, and the effect on the efficiency of operation if these employees are included with the regular unit.

#### ORDER

Based on the foregoing findings of fact, conclusions of law, and the entire record in this matter, it is hereby ORDERED that:

The petition for representation by the Modesto Teachers Association be REMANDED to the Chief of the Division of Representation for further proceedings consistent with this Decision.

Members Morgenstern and Burt joined in this Decision.